In all the circumstances, I considered that I should maintain the injunction and the defendants' applications were accordingly dismissed with costs. I further ordered that the injunction should apply to the dwelling house plot and to D2, the substituted second defendant. Finally, there was an order for early trial.

Order accordingly.

Solicitors: *Syarikat Mohideen Abdul Kader; Rajasingam & Co.*

TAN LIAN HENG v. KILANG PAPAN AMAN SDN. BHD. & ANOR.

[O.C.J. (Shaik Daud J.) December 31, 1983]

[Kuantan – Civil Suit No. 179 of 1980]

Damages – Foot – Right foot crushed and deformed – Loss of wages – Pain and suffering.

Tort – Negligence – Plaintiff's right foot crushed by forklift in the course of employment.

On or about October 22, 1975, the plaintiff was run over by the tyre of a forklift belonging to the first defendant and driven by the second defendant. As a result, his right foot was crushed and deformed and he walked with a limp. The accident occurred during and in the course of the plaintiff's employment as a forklift attendant. The plaintiff was 17 years old at the time of the accident. He averred that the defendants were negligent and claimed against his employers loss of wages for 40 months, expenses and general damages. Both defendants have denied liability and the alleged negligence.

Held: (1) on the facts disclosed in the evidence, the second defendant is wholly liable and the plaintiff had in no way contributed to the accident;

(2) the plaintiff should be awarded damages of $28,000.00 for loss of total earnings, $30,000.00 for pain and suffering, $16,300.00 for loss of earning capacity, and $33,900.00 for future loss of earning capacity and interest at 3% p.a. on special damages from the date of accident to the date of service and thereafter at 6% p.a.; no interest on the amount for future loss of earnings; 6% p.a. on the rest of the award from the date of service of the writ to the date of judgment and thereafter at 8% p.a.

Cases referred to:

(1) *Murtadza b. Mohd. Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.
(2) *Jefford* v. *Gee* [1970] 1 All E.R. 1202.

CIVIL SUIT.

Mahinder Singh for the plaintiff.

Loy Tuan Bee for the defendants.

Cur. Adv. Vult.

Shaik Daud J.: This is a claim by the plaintiff against his employers arising out of an accident at the worksite. The Statement of Claim states that the plaintiff was employed by the first defendant, a private limited company, and that the second defendant was employed by the first defendant at a sawmill at Batu 7½ Jalan Gambang, Kuantan. On or about October 22, 1975, the plaintiff was run over by the tyre of a forklift belonging to the first defendant and negligently driven by the second defendant. This accident occurred during and in the course of the employment where the plaintiff suffered personal injuries and loss. The plaintiff in his Statement of Claim contends that as a result of the accident his right foot was crushed and deformed. He now claims loss of wages for 40 months, expenses and general damages. Both the defendants have denied liability and the alleged negligence.

The plaintiff in his evidence states that he is 25 years old and that on October 22, 1975 he was working as a forklift attendant. The forklift No. CE 6401 was driven by the second defendant. The plaintiff then describes his work as an attendant. He says that he had to follow the forklift wherever it went. At the sawmill where the plaintiff worked huge pieces of logs were cut into small pieces and planks and the forklift was used to convey the cut pieces to be stacked outside the mill. The plaintiff states that in order for the forklift to lift the sawn timber from the ground there had to be a space between the sawn timber and the ground. This space was created by placing two pieces of wedge called "long" under the sawn timber. As an attendant it was the plaintiff's duty to follow the forklift to the place where the sawn timber was to be stacked, then plaintiff would place the two "longs" or wedges on the ground after which the driver of the forklift would lower the load of sawn timber onto the two wedges.

The plaintiff states that on the day in question the forklift driven by second defendant had taken sawn timber from inside the mill to be stacked outside the mill, near the fence forming the boundary of the mill compound. Along this fence was a gravel road used by timber lorries to bring timber to the mill. The plaintiff states that on the day in question the gravel road was uneven as there were depressions caused by tyre marks of the timber lorries. As usual the plaintiff says he followed the forklift which was loaded with sawn timber to the side of the fence. As usual, the plaintiff went to get the two wedges which were by the fence. The plaintiff took one of the wedges

and placed it on the ground and wanted to go for the second wedge. He went to the side of the fence, took the second wedge and as he was bringing it to the spot, about one foot from the forklift on its right side, suddenly the forklift swung around and the plaintiff was hit by the forklift's left wheel and he fell down after which the wheel ran over his right foot. The plaintiff says that on seeing the forklift swung he threw the wedge and wanted to retreat but it was too late. The plaintiff states that at the time of the accident he was paid $6 per day per shift and that he used to work 1½ shifts and was paid an extra $3. On the average he would earn about $250 to $270 per month. After the accident he could not work either as an attendant or as a labourer and he also approached the defendant but they could not offer him any position. In view of his present condition as a result of the accident he could not get a job as a forklift attendant and was in and out of the hospital several times.

The plaintiff called Dr. A.F.M. Jacques, the Consultant Surgeon attached to Kelinik Pembedahan Fatimah, Kuantan, who examined the plaintiff on November 5, 1980 and tenders his findings as P2. Dr. Jacques states that the condition of the plaintiff's foot was definitely a result of loss of tissue and not because of treatment. He says that the loss of tissue was a result of the accident.

The plaintiff also calls an eye witness to the accident. He is Ong Sum Koy, who was the plaintiff's and the second defendant's "kepala" at the mill. This witness testifies that on the day in question he was about 28 feet away from the said forklift. According to Ong, the plaintiff had already placed one wedge on the ground and at that time the forklift was stationary with its engine running and the sawn timber was held high on the forklift. At this time he saw the plaintiff bringing the second wedge and at that time someone shouted at the driver of the forklift not to stack the sawn timber at that particular place. On hearing this, the driver suddenly reversed the forklift. At that time the plaintiff was approaching the forklift with the second wedge. According to Ong, the driver, the second defendant, did not even look at his rear before reversing. The left tyre of the forklift hit the plaintiff and Ong shouted to the second defendant to stop.

The second defendant gave evidence that on the day in question he was the forklift driver and the plaintiff his attendant. The rest of his evidence is in fact a confirmation of the evidence of the plaintiff and Ong. The second defendant says that after the plaintiff had placed the first wedge he heard someone shouting to him not to place the load at that particular spot. On hearing this he suddenly reversed and at that time he did not know exactly where the plaintiff was. Immediately after he reversed he heard a second shout when he stopped the forklift and discovered that the plaintiff had been hit. In cross-examination the second defendant agreed that he reversed suddenly on hearing the first shout and also agreed that when he suddenly reversed he did not think about the plaintiff. He also agreed that when he reversed he forgot about the safety of the plaintiff.

In his submission, learned counsel for the defence contends that since the plaintiff could also give instructions to the driver and vice versa he the plaintiff should have taken care of himself and could not completely depend on the driver. In that respect the plaintiff has to an extent contributed to the accident.

On the evidence available before the Court, especially the evidence of second defendant who practically admitted to being negligent when he admitted that he suddenly reversed and did not at all consider the safety of the plaintiff, the question of who is liable for this accident is as clear as daylight. In the circumstances of this case and when one pauses to consider the duty of plaintiff as an attendant, there is no other alternative to arrive at other than that the plaintiff can in no way be blamed for this accident irrespective of who could give instructions to whom. The plaintiff has not in any way shown one iota of negligence on his part. He was doing his normal duty of placing the wedges and in the normal circumstances as the forklift was stationary, there was no danger whatsoever to the plaintiff. It would have been an entirely different situation had he, the plaintiff, been moving about within the vicinity of the forklift when it was then in motion. In that situation the plaintiff would certainly have to look out for himself and ensure his own safety while doing his work. In the present case there was no reason whatsoever for the plaintiff to look out for himself when it was the duty of the second defendant to remain stationary. Although it may have been right for second defendant to move, even as suddenly as he did, on hearing the shout, but in doing so surely he must ensure that he was doing it safely. He must, before moving, make sure that it was safe for him to do so. It is my judgment that he owes a duty not only to the plaintiff but also to any other workers who may happen to be in the vicinity. In this case it is very apparent, even he himself in his evidence admitted that he reversed

suddenly without knowing where the plaintiff was and, according to him, forgot the safety of plaintiff. He must have known that the plaintiff was in the vicinity of the forklift, he must also have known the agileness and fastness of the forklift having been a driver for some six years. Although he reversed suddenly in response to the shout but nevertheless he must ensure the safety of the plaintiff before doing so. His own evidence itself, let alone that of the plaintiff and Ong, showed his gross negligence. Even the Managing Director of the first defendant concedes in his evidence in cross-examination that before moving the forklift the driver must ensure that the attendant is safe. Both the first and second defendants in their evidence have in fact strengthened the evidence of the plaintiff. On the facts disclosed in the evidence before me, I hold the second defendant to be wholly liable and that the plaintiff has in no way contributed to the accident. The defence has adduced no evidence anywhere to show contributory negligence by the plaintiff.

On damages I find the plaintiff was 17 years old at the time of the accident. As a result of the accident his right foot was crushed and is now deformed and he now walks with a limp. The photograph on page 2 of enclosure (39) shows clearly the deformity to the foot. Before the accident he was a paid forklift attendant earning $6 per day and sometimes more when he worked overtime. He has now lost his job and cannot get another job as an attendant or even as a labourer. Both parties have agreed that the item of special damages for the medical report be $70/. As for travelling expenses the plaintiff claims $300. I am of the view that this figure of $300 is quite reasonable as the plaintiff lives in Raub and had to come to Kuantan for treatment. For loss of total earnings learned counsel for defence in his submission appears to have agreed that it should be from the date of accident, that is, October 22, 1975 to January 5, 1977, that being the last date of treatment totalling 14 months. The plaintiff's earnings then was around $200 per month. As such, I awarded a total amount of $28,000 for loss of earnings. For pain and suffering, learned counsel for defence quoted some cases where for almost similar injury in 1976 the Court awarded $20,000. It is my view that $20,000 in 1976 cannot be the same in 1983. As such, I am of the view that a sum of $30,000 for pain and suffering would be a more realistic figure in this time and age. As for loss of earning capacity, no doubt the plaintiff has to mitigate his loss. In this case the plaintiff says that after the treatment he went back to see Mr. Quek the Managing Director but was told that there was no position for him. After that he tried to get other jobs but was not successful as he did not have the qualification. In view of his condition he could not get jobs which entail heavy work. I find that he had tried to mitigate his losses and as such, I awarded him a total sum of $16,300. This figure I arrived at is for 81½ months from the date the plaintiff was last treated January 5, 1977 up to the date of judgment November 15, 1983 at $200 per month.

As for future loss of earning capacity, I find that plaintiff is 25 years old and healthy but for the deformity; he could continue working for a considerable number of years. For assessment of the loss of future earnings, the basis must be the reasonable duration of the working life which the plaintiff would have but for the accident. As I said earlier, at the time of the accident the plaintiff was 17 years old and now he is 25 and appears quite healthy. The possibility that the plaintiff can continue working for another 30 years up to the normal retiring age of 55 years cannot be ruled out. In the circumstances, and after reduction for contingencies, it is my judgment that a multiplier of 25 would be a reasonable figure. For this item I therefore award the plaintiff at $200 per month for 25 years totalling $33,825.46 and rounding it off to $33,900.

As for interest I refer to the Federal Court decision in *Murtadza b. Mohd. Hassan* v. *Chong Swee Pian*[1] at p.218 where the decision in the Court of Appeal in England of *Jefford* v. *Gee*[2] was followed. In the circumstances I award interest of 3% per annum on special damages from the date of accident to the date of service and thereafter at 6% per annum. I award no interest on the amount for future loss of earnings but on the rest of the award at interest of 6% per annum from the date of service of the writ to the date of judgment and thereafter at 8% per annum.

Order accordingly.

Solicitors: *Mahindar & Co.; Mah-Kok & Din.*